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In The

Supreme Court of the United States

October Term,1996

Robert C. Wilson, *Petitioner*

v

Sammy Drake, United States of America,
Responent(s)

On Petition For Writ of Certiorari
From the 9th Circuit Appellate Court

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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59 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does California law provide an exception to its general law of respondeat superior such that a federal employee committing assault and battery and false imprisonment will not be found to have done so in the course and scope of employment when the effect of such a finding would be to immunize such employee from his own tort liability?

2. Do the policy considerations underlying California's law of respondeat superior, *viz*, to prevent recurrence of the tortious conduct, to give greater assurance of compensation for the victim, and to assure that the victim's losses will be equitably borne by those who benefit from the enterprise giving rise to the injury, compel a determination under California law, that an employee committing assault and battery and false imprisonment will not be found to have done so in the course and scope of employment when the effect of such a finding would be to immunize both the employer and the employee from liability for such torts?

3. Did the opinion of the California Supreme Court in Lisa M. v. Henry Mayo Hospital, (1995) 12 Cal.4th 291, 48 Cal.Rptr.2d 510, change the law of respondeat superior in California so that an employer would not be found liable for the assault and battery and/or false imprisonment alleged in this case because it was unusual and startling and not foreseeable in the sense of being sure to take place?

4. Did the Court of Appeal err in not

remanding the case to the District Court for a scope of employment determination in light of Lisa M.?

PARTIES

The parties to this action are ROBERT WILSON, the Plaintiff and Petitioner herein, and SAMMY J. DRAKE and THE UNITED STATES OF AMERICA, Defendants and Respondents herein.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

Wilson v. Drake 87 F.3d 1073, 1996 U.S. App., LEXIS 15752 (9th Circuit 1996)

In The

Supreme Court of the United States

October Term, 1996

No. 96- _____

Robert C. Wilson,
Petitioner,

v.

Sammy Drake, United States
Of America, Respondent(s)

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert C. Wilson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-captioned case on July 1, 1996.

OPINIONS BELOW

The Ninth Circuit opinion is reported at

87 F.3d 1073, and is reprinted in the appendix hereto ("App.") at 1a. The opinions and orders of the United States District Court for the Central District of California are unreported and are reprinted at App.13a and 15a.

BASIS FOR JURISDICTION

i. Decision of the Ninth Circuit Court of Appeals; entered July 1, 1996.
ii. Petition for Rehearing denied September 16, 1996. App. 16a
iii. Not applicable.
iv. 28 U.S.C. §1254(1)
v. Not applicable.

APPLICABLE STATUTORY PROVISIONS

Federal Tort Claims Act: 28 U.S.C. §2671 et seq., particularly §§ 2679 and 2680, reproduced in the Appendix. App. 17a.

STATEMENT OF THE CASE

i. This is an intentional tort action for assault & battery and false imprisonment, brought by Petitioner ROBERT WILSON, who was an engineer at the Naval War Center at Pt. Mugu, California, against his immediate supervisor, Defendant SAMMY J. DRAKE (hereinafter "DRAKE").

Petitioner initially brought this action against DRAKE in the Ventura County Municipal Court, State of California, seeking damages for "injury to reputation, battery, and violation of personal space". Petitioner alleges that in the morning of June 30, 1992,

DRAKE used physical force in preventing Petitioner from leaving his office to go to the bathroom, for a period of approximately thirty minutes, and that in the afternoon of that day, DRAKE hit Petitioner's hand and climbed up upon Petitioner's torso, holding down Petitioner's arms and hands, in an attempt to turn off Petitioner's tape recorder.

The United States Attorney thereafter certified that DRAKE was acting within the scope of his employment with respect to the alleged incidents, and removed this case to the United States District Court for the Central District of California, under the "Westfall Act", 28 U.S.C. §2679(d), substituting the United States as a Defendant in place of DRAKE. The United States then moved to dismiss the action, on the ground that the torts alleged by Petitioner were barred by 28 U.S.C. §2680(h), which exempts certain intentional torts from the Federal Tort Claims Act.

The District Court granted the United States' motion to dismiss. Rather than dismiss the action, however, the Court granted Petitioner's request to re-substitute DRAKE as the Defendant. The Court explained that even though California law establishes a broad definition of "scope of employment", the California Supreme Court would make an exception to existing case law where the effect would be to immunize the employee from liability and deprive the Petitioner of a remedy.

DRAKE then moved for summary judgment, providing additional information and

affidavits concerning the employment-related nature of the alleged incidents. The District Court denied the motion, reiterating its previous holding that even though the alleged conduct falls within the "scope of employment", as defined by California law, that definition should not be followed "where the result would be to immunize the individual from his own acts".

Before the case could proceed to trial, Defendants obtained a stay, pending appeal from the United States Court of Appeals for the Ninth Circuit. In the Appeal, Defendants argued that the District Court judge had erred in re-substituting DRAKE as the Defendant, and denying the motion for summary judgment, in that the California courts would not be allowed to carve out an exception to its general respondeat superior law for federal employees, in order to prevent the immunization of DRAKE from liability for the intentional torts committed by him upon the Petitioner. Petitioner contended that the District Court had not erred because an exception, as such, was not required, in that the policy considerations for applying the doctrine of respondeat superior, *viz*, to prevent recurrence of the tortious conduct, to give greater assurance of compensation for the victim, and to assure that the victim's losses would be equitably borne by those who benefit from the enterprise giving rise to the injury, would compel a determination that respondeat superior should not be applied, and that the acts complained of by the Petitioner were not in the course and scope of DRAKE's employment. The Ninth Circuit found that the District Court had erred in determining that an

exception would be applied for federal employees under California's respondeat superior law and that policy considerations underlying respondeat superior in California could not be used to support a finding that Drake was not acting in the course and scope of his employment when he committed his assault and battery on, and false imprisonment of, the Petitioner.

Petitioner filed a Petition for Rehearing with suggestion of appropriateness of rehearing en banc, App. 23a. In such Petition, Petitioner argued that following the case being submitted for decision on December 14, 1995, the California Supreme Court issued an opinion in the case of Lisa M. v. Henry Mayo Hospital, (1995) 12 Cal.4th 291, 48 Cal.Rptr.2d 510, essentially changing the law of respondeat superior in California, and that the law in California as pronounced by Lisa M. was that in order for a determination to be made that a tort was committed in the course and scope of employment, the risk of the tort must be inherent in the working environment and, in a general way, foreseeable from the employee's duties, such foreseeability existing only as respects those types of injuries that as a practical matter are sure to occur in the conduct of the employee's enterprise. Petitioner also requested in such Petition that the case be remanded to the District Court for a
scope of employment determination in light of Lisa M.

The Ninth Circuit thereafter denied the Petition for Rehearing, and Request for en banc consideration.

ii. Federal jurisdiction in the United States District Court for the Central District of California was pursuant to 28 U.S.C. §1442.

ARGUMENT

1. California law provides an exception to its general law of respondeat superior such that a federal employee committing assault and battery and/or false imprisonment will not be found to have done so in the course and scope of employment when the effect of such a finding would be to immunize such employee from his own tort liability.

While the Ninth Circuit found that the California courts could not make an exception to its general respondeat superior law for Federal employees, it is clear Congress in passing the Federal Employees Liability Reform & Tort Compensation Act of 1988, 28 U.S.C. §2679(b)1) ("FELRTCA"), intended that whatever the law of respondeat superior was in the place where tortious activity occurred, would be applied. As was noted in this Court's opinion in Gutierrez de Martinez v. Lamagno, (1995) 115 S.Ct. 2227, scope of employment is one question and who is to decide is another. By virtue of the certification and removal process, Federal judges will decide the scope of employment issue applying, however, the law of the state where the tort took place.

The District Court judge in this case applied the law of California as he thought the California courts would apply it, carving an exception to the general respondeat superior law in the unique circumstances of a scope determination resulting in the

immunization of the tortfeasor. His determination as to what the law of California would be is entitled to great weight, as this Court has recognized. Railroad Commission v. Pullman Co. (__) 312 U.S. 496, 499.

The Ninth Circuit's rejection of the District Court's position on the basis that it nullifies Federal statutes which give immunity to Federal employees is untenable. Congress intended that scope determinations be based on local law. It knew that identical tortious activity in two different states could give rise to a determination that it was within the scope of employment in one state and outside the scope of employment in the other. Empowering Federal judges to determine that the law of the state where the tort occurred would not permit a scope determination resulting in the immunization of the tortfeasor, and that an exception would be carved out in such circumstances, does not thwart the will of Congress. If Congress had intended that all Federal employees should be immunized for the torts of assault and battery and false imprisonment occurring at the workplace during working hours and arising out of work related issues, it could have expressly so stated rather than allowing scope determinations on such matters to be made under the varying provisions of law of the several states. By incorporating into California state law, an exception which he thought the California courts would carve out, the District Court judge did no more than what Congress intended in enacting the FELTRCA.

2. The policy considerations underlying California's law of respondeat superior, *viz*,

to prevent recurrence of the tortious conduct, to give greater assurance of compensation for the victim, and to assure that the victim's losses will be equitably borne by those who benefit from the enterprise giving rise to the injury, compels a determination under California law, that an employee committing assault and battery and/or false imprisonment will not be found to have done so in the course and scope of employment when the effect of such a finding would be to immunize both the employer and the employee from liability for such torts.

Even though some intentional torts similar to those committed by DRAKE upon the Petitioner have been held to be within the course and scope of employment, the California Supreme Court would conclude that the actions of DRAKE complained of by Petitioner were not performed in the course and scope of his employment.

As the California Supreme Court stated in the case of Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99 :

> "Recently, we articulated three reasons for applying the doctrine of respondeat superior: (1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably born by those who benefit from the enterprise that gave rise to the injury (citing Perez v. Groningen & Sons Inc., 41 Cal. 3d 962, 967, and 5 Harper et al., The Law of Torts (2d ed 1986) at Section 26.5, at

Page 21)."

Though Defendants contended that the California courts cannot be allowed to carve out an exception from its general respondeat superior law for federal employees in order to prevent the immunization of DRAKE from liability for the intentional torts committed by DRAKE upon the Petitioner, it is clear that the carving of such an exception is not required in order to reach such a result. All that is required is that the California courts apply the general principles applicable to respondeat superior noted in Mary M. and Perez, which would yield a conclusion that DRAKE was not acting within the scope and course of his employment. These principles have recently been applied by the California Court of Appeal in denying employer liability under respondeat superior in cases not involving the federal government in any way [Thorn v. City of Glendale (1994) 28 Cal. App. 4th 1379, 1383, 35 Cal Rptr. 2d 1; Debbie Reynolds Professional Rehearsal Studios v., Superior Court (1994) 25 Cal. App 4th 222, 226-229, 30 Cal. Rptr.2d 514; and Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1618, and 1621-22, 25 Cal. Rptr. 2d 308]. Such cases make clear that in California the law of respondeat superior is not to be applied in any case without reference to the policy considerations which have been articulated in Mary M. and Perez set forth hereinabove. The California Supreme Court would apply them here.

Thus, as one of the objectives of applying the doctrine of respondeat superior

is to prevent recurrence of the tortious conduct, in any context where the application of that doctrine would, instead of preventing a recurrence of the such conduct, actually promote its recurrence, the doctrine will not be applied. Even if the employer of the tortfeasor were not the Federal government, the California Supreme Courts would not apply the doctrine of respondeat superior to encourage recurrence of the tortious conduct. Certainly, if the net result of this case is that a Federal supervisor may commit an assault and battery upon, and falsely imprison, a subordinate, without any civil liability for his wrongdoing, that conduct would tend to be encouraged rather than prevented by the application of the respondeat superior doctrine. The same would be true in any situation involving the unique result of a scope determination immunizing the individual tortfeasor from liability. The rationale for denying respondeat superior liability would be applicable in such a situation, regardless of the identity of the employer.

As articulated in Mary M. and Perez, another reason for applying the respondeat superior doctrine is to give greater assurance of compensation for the victim. The doctrine of respondeat superior would not be applied by the California Supreme Court if the net result was exactly the opposite, i.e. to defeat the possibility of any compensation for the victim. Here, application of the doctrine of respondeat superior would yield precisely that result, as would be the case in any situation where a scope determination would generate such a result, regardless of the identity of the employer.

Finally, the California Supreme Court would apply the respondeat superior doctrine to ensure that the victim's losses will be equitably born by those who benefit from the enterprise that gave rise to the injury. Again, if a scope determination would fail to spread the risk of the loss of activity on the enterprise incident to which the injury occurred, the doctrine would not be applied, regardless of the identity of the employer.

Though not citing Mary M. and Perez, the District Court clearly had in mind the fact that the California courts had utilized the respondeat superior doctrine to expand liability for the acts of a tortfeasor, rather than limiting it, and by no stretch of the imagination, and had never applied the doctrine to immunize the individual tortfeasor. It was the District Court's responsibility to make a determination of what it believed the California Supreme Court would rule with respect to application of the respondeat superior doctrine, in a situation where the effect of its determination was to effectively deprive the victim of an intentional tort of any recourse whatsoever. The District Court wisely concluded that the California Supreme Court would not apply the doctrine under these circumstances. Mary M. and Perez make it clear that the District Court's prediction of what the California Supreme Court would do in these circumstances was correct.

3. The opinion of the California Supreme Court in Lisa M. v. Henry Mayo Hospital, changed the law of respondeat superior in California so that an employer would not be found liable for the assault and battery

and/or false imprisonment alleged in this case because it was unusual and startling and not foreseeable in the sense of being sure to take place.

This case was submitted for decision to the Court of Appeal on December 14, 1995. On December 26, 1995, the Supreme Court of California issued its opinion in the case of Lisa M. vs. Henry Mayo Newhall Memorial Hospital, 48 Cal.Rptr. 2d 510. This case reflects the latest pronouncement of the California Supreme Court as to the law of respondeat superior in California and represents a change in such law.

In Lisa M., the Petitioner patient was molested by an ultra sound technician assumed for the purpose of the decision to be an employee of the defendant hospital. The molestation occurred while the ultra sound technician was conducting a prescribed examination of the Petitioner. Petitioner sued the ultra sound technician and the defendant hospital for various torts, including battery. An issue for decision was whether the defendant hospital was vicariously responsible for the battery as a tort committed within the scope of the ultra sound technician's employment. In deciding that such battery was not committed within the scope of the ultra sound technician's employment, the California Supreme Court had occasion to review, restate and reformulate the pertinent law on respondeat superior in California. In finding that the hospital was not responsible for the battery committed by the ultra sound technician, the California Supreme Court noted that it is not enough that the employment brought the tortfeasor and

victim together in time and place. The tort must be inherent in the working environment and, in a general way, foreseeable from the employee's duties. Such foreseeability only exists as respects those types of injuries that, as a practical matter, are "sure" to occur in the conduct of the employee's enterprise. The employment, in other words, must be such as "predictably" to create the risk that employees will commit intentional torts of the type for which liability is sought. 48 Cal.Rptr. 2d @ 514 and 516.

The Court in Lisa M. also had occasion to distinguish the case of Mary M. vs. City of Los Angeles, cited by the Court of Appeal in its opinion, noting that in Mary M. it had held a police officer's assault as a generally foreseeable consequence of his position stating further that in view of the considerable power and authority that police officers possess it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. 48 Cal.Rptr. 2d @ 518.

It is also noteworthy that the California Supreme Court in deciding Lisa M. considered the three identified policy goals of the respondeat superior doctrine: 1) preventing future injuries, 2) assuring compensation to victims and 3) spreading the losses caused by an enterprise equitably -- for additional guidance as to whether the doctrine should be applied in the circumstances before it. It found no firm direction from consideration of the first two policy goals and as to the third, it determined that the question still to be asked was whether the employee's conduct was so unusual or startling that it would seem

unfair to include the loss resulting from it among the other costs of the employer's business. It found that the ultra sound technician's activities to be too "attenuated" to support the allegation of Petitioner's losses to the hospital as a cost of doing business. 48 Cal.Rptr. 2d @ 519.

It is clear from this latest pronouncement of the California Supreme Court in the case of Lisa M., that it would find Drake's employer, whoever it might be, not necessarily the Federal Government alone, not responsible under the principles of respondeat superior for Drake's assault and battery and false imprisonment of the Petitioner but would, rather, find to the contrary because Drake's actions were not foreseeable in the context of the particular enterprise of the employer.

Specifically, it was not foreseeable that Drake, as a supervisor of the Petitioner, an engineer, would resort to the use of force in order to accomplish any of Drake's actual or perceived job responsibilities. It would not be foreseeable that inquiry by Drake as to whether Petitioner had obtained information concerning a doctor's recommendation that Petitioner receive reasonable accommodation of his carpal tunnel syndrome would involve Drake falsely imprisoning the Petitioner. Similarly, it would not be foreseeable that Drake would assault and batter the Petitioner in an attempt to cause to Petitioner to either turn off or not activate his tape recorder. That Drake undertook these activities is both unusual and startling 48 Cal. Rptr. 2d @ 519. Accordingly, they fell outside the scope of

his employment.

4. The Court of Appeal erred in not remanding the case to the District Court for a scope of employment determination in light of Lisa M.

Drake's motion for summary judgment was denied by the District Court and the Court of Appeals opinion reversed that determination and remanded the case to the District Court with directions to substitute the United States as the defendant in place of Drake and dismiss the action. Particularly, in light of changes in the law of respondeat superior in California wrought by Lisa M., the District Court should be allowed to make factual and legal determinations after an evidentiary hearing as to whether Drake was acting within the scope of his employment when he subjected Petitioner to false imprisonment and assault and battery. Meridian Int'l Logistics v. United States, 939 F.2d 740 (9th Cir. 1991) The District Court never had an opportunity to do this, finding as it did that in California respondeat superior would never be applied so as to immunize the individual tortfeasor. Even if the District Court was in error in so finding, it should nonetheless be given an opportunity to make its own determination on the scope of employment issue under the current state of California law.

CONCLUSION

For the foregoing reasons, the within Petition for Certiorari should be granted.

Respectfully submitted this 16th day of December, 1996.

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APPENDICES

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert Wilson, Plaintiff-Appellee,	)	No. 94-56428
	)	
V	)	D.C. No Point
	)	CV-93-06826-JSL
Sammy Drake; United States of America,	)	
	)	OPINION
Defendants-Appellants	)	

Appeal from the United States District Court
For the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
December 14, 1995-Pasadena, California

Filed July 1, 1996

Before: Mary M. Schroeder, Warren J. Ferguson, and Diarmuid F. O' Scannlain, Circuit Judges.

Opinion by Judge O' Scannlain

SUMMARY

Torts/Government Law

The court of appeals reversed a district court judgment and remained. The court held that a federal employer was entitled to immunity for intentional torts allegedly committed by one of its employees against another on a government installation in California.

Appellee Robert Wilson, an engineer at a Naval center in California, filed a complaint in California state court against his immediate supervisor, appellant Sammy Drake, in his individual capacity for "injury to reputation, battery, violation of personal space." Wilson alleged that Drake came to his office to request information concerning a doctor's recommendation that he receive reasonable accommodation for carpal tunnel syndrome, and then prevented Wilson from leaving for leaving for approximately 30 minutes. Wilson further alleged that Drake used physical force later that day to prevent him from tape recording a conversation.

A United States Attorney certified that Drake "was acting within the course and scope of his employment with the United States" at times material to the alleged incidents. The action was removed to a federal district court, and appellant the United States (government) was substituted as the defendant in place of Drake.

The government moved to dismiss for lack of subject matter jurisdiction under the Federal Tort Claims Act (FTCA) on grounds that Wilson failed to file an administrative claim as required and his claims were barred by a statute that exempts from the FTCA claims arising out of assault, battery, or false imprisonment. Wilson moved for resubstitution of Drake as defendant. The district court denied Drake's motion for summary judgment, stating that the California Supreme Court would say that intentional tortious acts done outside of the actor's authority can produce liability even to federal employees and even if there is a declaration that the acts were done within the course and scope of employment.

The court of appeals ordered that the district court's order could be immediately docketed as an interlocutory appeal from denial of

immunity and granted a motion to stay the district court case pending appeal.

[1]The FTCA provides a cause of action against the federal government for persons who are injured by the tortious activity of an employee of the federal government, where the employee was acting within the scope of his or her office or employment. A statute that amended the FTCA provides that the remedy against the government under the FTCA is "exclusive of" other civil actions or proceedings for monetary damages. [2] The FTCA bars causes of action for intentional torts such as assault, battery, and false imprisonment.

[3] Because Wilson's complaint was limited to assault, battery, and false imprisonment, and because he failed to exhaust his administrative claim, his suit had to be dismissed for lack of subject matter jurisdiction if Drake was acting within the scope of his employment. [4] FTCA scope of employment determinations are made according to the respondeat superior principles of the state in which the alleged tort occurred, and California law applied in this case. [5] California's broad definition of "scope of employment" encompassed the actions Wilson attributed to Drake. The alleged acts took place in the office during regular business hours and involved work-related matters. [6] More than sufficient support existed to justify the United States Attorney's certification that Drake was acting within his scope of employment. [7] There appeared to be no legal justification for the district court's conclusion that although Drake acted within the scope of his employment under California law, a California court would avoid reaching that pollution so that Drake would not receive immunity for his alleged behavior. [8] As long as the alleged acts are within the scope of employment, even an offending employee may be immunized for intentional torts also found to be within that scope.

[9] Remand was warranted so that the district court could substitute the government as the defendant and dismiss Wilson's intentional tort action against the government.

COUNSEL

Matthew M. Collette, Department of Justice, Washington D.C., for the defendants-appellants.
Bennett Rolfe, Rolfe, Smith-Low & Coleman, Camarillo, California, for the plaintiff-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a federal employer is entitled to immunity for intentional torts allegedly committed by one of its employees against another on a government installation in California.

I

Robert Wilson is an engineer at the Naval Air Warfare Center in Point Mugu, California; Sammy Drake is his immediate supervisor. In June 1993, Wilson filed a complaint in California state court against Drake in his individual capacity for "injury to reputation, battery, violation of personal space."

Wilson alleges that on one occasion in June 1992, Drake allegedly came to his office in the morning to request information concerning a doctor's recommendation that he receive reasonable accommodation for his carpal tunnel syndrome. Wilson claims that when he tried to leave his office to go to the bathroom, Drake prevented Wilson from leaving for approximately thirty minutes.

Wilson also alleges that Drake used physical force later that day to prevent him from tape recording a conversation: "DRAKE thereupon climbed upon my torso, used his body to hold me down and his arms and hands in an attempt to prevent me from turning the tape recorder

back on." Wilson claims that he sustained some physical injury and severe emotional distress and mental anguish as a result of the actions of DRAKE".

For his part, Drake maintains: "I have stood in [Wilson's} doorway while trying to talk to him; but, I have never blocked his exit and certainly never stayed thirty minutes as he claims in his declaration". Drake also denies Wilson's claim that Drake climbed upon his torso and held Wilson down.

In due course, the United States Attorney for the Central District of California certified, pursuant to 28 U.S.C. 2679(d), that Drake "was acting within the course and scope of his employment with the United States, at all times material to such alleged incidents [in Wilson's complaint]." As a result of the certification, the action was removed from state court to the United States District Court for the Central District of California and the United States was substituted as the defendant in place of Drake.

The United States then moved to dismiss for lack of subject matter jurisdiction under the Federal Tort Claims Act ("FTCA") on the grounds that (1) Wilson had failed to file an administrative claim as required by 28 U.S.C. 2675 (a), and that (2) Wilson's claims were barred by 28 U.S.C. 2680 (h), which exempts from the FTCA "[a] ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Wilson opposed this motion and also moved for resubstitution of Drake as the defendant.

At a hearing on the motion to dismiss, the district court indicated that it would grant the government' s motion to dismiss because the United States cannot be sued for intentional torts. However, the court also indicated that it would grant Wilson's request to have Drake resubstituted for the United States as the defendant, thus preserving Wilson's tort action. The district court provided the

following explanation for its decision:

The Court notes that the California cases construing the scope of employment have done so for the purpose of extending rather than limiting liability. The Court believes that the California Supreme Court, confronted with the facts of this case, would carve an exception from the broad construction of course and scope of employment heretofore given only in cases where the effect is to create an additional liable party. Rather, the Court believes that the California Supreme Court would construe course and scope more narrowly when faced with facts such as those in this case, so as not to have the effect of eliminating a party's responsibility for its own intentional acts and leaving the plaintiff with no remedy at all.

Wilson v. United States, No. 93-6826, at 2-3 (C.D. Cal. Apr.20, 1994) (unpublished order).

Since the court had resubstituted him as the defendant, Drake then submitted several affidavits of his superiors and co-workers in support of a motion for summary judgment. In this motion, Drake argued that since he was acting within the scope of employment, the United States is the proper defendant under the FTCA.

The district court denied Drake's motion for summary judgment. The court acknowledged that the alleged conduct fell within California's definition of scope of employment, but maintained that "properly educated,...the California Supreme Court-will say...[that] intentional tortious acts, acts done outside the authority of the actor, can produce liability even to federal employees, even if there is a declaration that those same acts are done within course and scope." Transcript of Proceedings Before Hon. J. Spencer Letts in Wilson v.United States, No. 93-6826, at 7 (C.D. Cal. Sept. 26, 1994).

After the district court indicated that it would proceed with trial despite the filing of the notice of appeal, Drake and the United States moved this court for an emergency stay pending appeal. On October

31, 1994, this court ordered that the district court's order could be immediately docketed as an interlocutory appeal from denial of immunity and granted the motion to stay the district court case pending appeal.

II

[1] The FTCA, 28 U.S.C. 1346 (b), provides a cause of action against the federal government for "persons injured by the tortious activity of an employee of the United States, where the employee was 'acting within the scope of his office or employment...' " Meridian Int' l Logistics v United States, 939 F.2d 740, 742 (9th Cir. 1991) (quoting 28 U.S.C. 1346 (b)). The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("FELRTCA" or "Westfall Act"), which amended the FTCA, provides that "[t] he remedy against the United States" under the FTCA "is exclusive of any other civil action or proceeding for monetary damages." 28 U.S.C. 2679 (b) (1).

[2] If Drake were acting within the scope of his employment, then the FTCA would provide Wilson's exclusive remedy. 28 U.S.C. 2679 (b) (1); see United States v. Smith, 111 S. Ct. 1180, 1183-85 (1991); Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993), cert. Denied, 115 S. Ct. 58 (1994). However, the FTCA expressly bars causes of action for intentional torts such as assault, battery, and false imprisonment. 28 U.S.C. 2680 (h); see 28 U.S.C. 2679 (d) (4) (actions against government pursuant to section 1346 (b) (the FTCA) are "subject to the limitations and exceptions applicable to those actions"). As a second jurisdictional limitation, a FTCA action "shall not be instituted" against the United States unless the claimant first presents his claim to the "appropriate federal agency" and the claim is denied. Meridian, 939 F.2d at 743 (citing 28 U.S.C 2675 (a)).

[3] Since Wilson's complaint is limited to assault, battery, and false imprisonment, and since he failed to exhaust his administrative claim, his suit must be dismissed for lack of subject matter

jurisdiction if Drake was indeed acting within the scope of his employment. 28 U.S.C. 2675 (a), 2680 (h).

[4] For purposes of the FTCA, this court reviews de novo whether a government employee was acting within the scope of his employment. Meridian, 939 F.2d at 745. FTCA scope of employment determinations are made "according to the principles of respondeat superior of the state in which the alleged tort occurred." Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 876 (9th Cir. 1992) (citations omitted). Here, California law applies.

California extends respondeat superior liability to cases where " 'the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.' " Mary M. V. City of Los Angeles, 814 P.2d 1341, 1344 (Cal.1991) (quoting Perez v. Van Groningen & Sons, Inc., 719 P.2d 676, 678-79 (Cal.1986) (citation omitted)). Under this rule, even "[t] ortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment." Id. An assault or battery committed by an employee is within the scope of employment even if it violates the employer's direct orders if it results from "a dispute arising out of the employment." Carr v. Wm. C. Crowell Co., 171 P.2d 5, 7 (Cal. 1946) (employee of general contractor who threw hammer at employee of subcontractor during work-related dispute acted within scope of employment). Only where an employee "substantially departs from his duties for purely personal reasons" will liability fail to attach. John R. V.84 Oakland Unified Sch. Dist.,769 P.2d 948, 953 (Cal. 1989).

[5] California's broad definition of "scope of employment" encompasses the actions that Wilson attributes to Drake. The acts alleged all took place in the office during regular business hours and involved work-related matters. Even Wilson himself has acknowledged that the alleged torts "involved work related issues." See Plaintiff's Opposition to Defendant's Motion for Summary

Judgment at 2-3, Wilson v. Drake, No. 93-6826 (C.D. Cal. Sept.12, 1994). In fact, both of the alleged incidents took place when Drake, in his capacity as Wilson's supervisor, was trying to obtain information from Wilson concerning Wilson's work-related disability.

[6] Thus, more than sufficient support exists in the record to justify the U.S.Attorney's certification that Drake was acting within his scope of employment. Even if Drake's actions could be seen as within the scope of his employment insofar as he was attempting to prevent Wilson's unauthorized taping of conversations in the workplace.

[7] As for the district court's interpretation of California state law, there appears to be no legal justification for the district court's conclusion that although Drake acted within the scope of his employment under California law, a California court would avoid reaching this conclusion so that Drake would not receive immunity for his alleged behavior. Such reasoning conflicts with United States v. Smith, 111 S. Ct.1180 (1991), in which the Supreme Court held that the FTCA is "the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." Id. At 1185; see Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2233 (1995) ("When the United States retains immunity from suit, certification disarms plaintiffs. They may not proceed against the United States, nor may they pursue the employee shielded by the certification.") (Citing Smith, 111 S. Ct.at 1185).

In Smith, the Supreme Court reversed this court's holding that the FTCA is the exclusive remedy for employment-related torts committed by government employees only when the FTCA in fact provides a remedy. Smith v. Marshall, 885 F.2d 650, 655 (9th Cir. 1989), rev'd sub nom. United States v. Smith, 111 S. Ct. 1180, 1184-85 (1991). The Smiths brought suit in the Central District of California against the Army doctor who delivered their baby (with

brain damage) at a U.S.Army hospital in Italy. The United States intervened and sought to have itself substituted as the defendant pursuant to the Gonzalez Act, 10 U.S.C. 1089, Which provides that in suits against military medical personnel for torts committed within the scope of their employment, the United States is to be substituted as the defendant and the suit is to proceed against the United States under the FTCA. See Smith, 111 S. Ct.at 1183 (citing 10 U.S.C. 1089 (a)-(b)). In addition, the Government argued that, because the action arose overseas, the FTCA exception excluding recovery for injuries sustained abroad, 28 U.S.C. 2680 (k), precluded government liability. The district court granted the government's motion for substitution and dismissed the action. Id.

Noting that section 2680 (k) precludes the Smiths from pursuing any remedy against the United States, this court refused to find that the "exclusive remedy" language of FELRTCA, which amended the FTCA in 1988, would operate to immunize the the Army doctor from the Smiths' suit against him individually. Smith, 885 F.2d at 654-55. Resolving a conflict among the circuits, the Supreme Court reversed this court and held that the FELRTCA indeed "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government." Smith, 111 S. Ct.at 1184-85.

[8] Therefore, as long as the alleged acts are within the scope of employment (as determined by the local state's respondeat superior law), even an offending employee may be immunized for intentional torts also found to be within that scope. As the Supreme Court concluded in Smith: " Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." Smith, 111 S. Ct. At 1185.

III

Finally, we consider Wilson's contention that the district court could

have reached its conclusion without carving out an exception to California's respondeat superior law. Relying on cases not cited by the district court, Wilson argues that California's respondeat superior doctrine is "sufficiently flexible so that the doctrine will not be applied in any situation where a remedy [for wrongs such as were alleged by Wilson] is completely extinguished." In support, Wilson stresses the following three policy considerations, which underlie California's respondeat superior law: "(1) to prevent recurrence of tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that give rise to the injury." Mary M.,814 P.2d at 1343-44 (citations omitted). Wilson's contention is without merit.

Although California courts have considered these policy considerations in the context of difficult respondeat superior cases, it is noteworthy that California cases have held that state and county employees acted within the scope of employment even when a California statute immunized both the employer and the employee. See, e.g., Cappuccio, Inc. V.Harmon, 257 Cal." Rptr. 4, 8 (Ct. App.1989); Kemmerer v. County of Fresno, 246 Cal. Rptr.609, 614 (Ct. App. 1988). This undermines the notion that a California court would apply a different version of respondeat superior to a federal employee has opposed to a non-federal employee simply to make certain that the plaintiff would have an available remedy.

Moreover, we emphasize that Wilson's application of such state law policy considerations would have the effect of nullifying the federal statutes that grant immunity to federal employees so that they can perform their duties without the threat of tort actions. As we have seen, the Supreme Court's holding in Smith precludes such a result. 111 S. Ct. At 1185.

IV

[9] For the foregoing reasons, we reverse the district court's order

denying summary judgment and remand with instructions (1) to substitute the United States as the defendant in place of Drake, pursuant to 28 U.S.C. 2679 (d), and (2) to dismiss Wilson's intentional tort action against the United States, pursuant to 28 U.S.C. 2680 (h).

REVERSED & REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Robert Wilson, Plaintiff	) CV 93-6826 JSL
	)
V.	) ORDER GRANTING MOTION
	) OF DEFENDANT UNITED
United States of America,	) STATES OF AMERICA TO
	) DISMISS, GRANTING
Defendant	) MOTION OF PLAINTIFF
	) ROBERT WILSON FOR
	) RESUBSTITUTION OF
	) DEFENDANT AND CHANGING
	) CAPTION, AND DENYING
	) MOTION OF PLAINTIFF
	) ROBERT WILSON FOR
	) REMAND OF ACTION TO
	) STATE COURT

The Motions of defendant United States of America to dismiss and of plaintiff Robert Wilson for resubstitution of defendant and forremand of action to state court came for hearing regularly on January 31, 1994. The Ex Parte Application of defendant United States of America for reconsideration or, in the alternative, to stay the remand for sixty days came for hearing regularly on February 28,1994.

Having reviewed the papers filed in connection with this matter, having heard oral arguement, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion of defendant United States of America to dismiss be GRANTED.

IT IS FURTHER ORDERED that the motion of plaintiff Robert Wilson for resubstitution of defendant be GRANTED,
thereby resubstituting defendant Sammy J. Drake in place of the United States. Accordingly, the caption in this action, until further

Order, shall read Robert Wilson, Plaintiff v. Sammy J. Drake, Defendant.

IT IS FURTHER ORDERED that the motion of plaintiff Robert Wilson for remand of action to state court be DENIED. The Court construes 28 U.S.C. 2679 (d) (2), which allows removal where the Attorney General certifies that a defendant was a federal employee acting within the scope and course of his employment, as being a procedural provision. The Court construes the certification process as creating an irrebuttable presumption for the purpose of establishing this Court's jurisdiction over the matter, but not for the purpose of determining the matter under state substantive law. The Court concludes that this presumption does not preempt the determination of such scope and course under state law, and so the federal statute is not dispositive of the substantive state law issue of the individual defendant's liability.

The Court therefore addresses the issue of whether the individual defendant, Sammy J. Drake, might be found liable to plaintiff under state law. The Court notes that the California cases construing the scope of employment have done so for the purpose of extending rather than limiting liability. The Court believes that the California Supreme Court, confronted with the facts of this case, would carve an exception from the broad contruction of course and scope of employment heretofore given only in cases where the effect is to create an additional liable party. Rather, the Court believes that the California Supreme Court would construe course and scope more narrowly when faced with the facts such as those in this case, so as not to have the effect of eliminating a party's responsbility for its own intentional acts and leaving the plaintiff with no remedy at all.

IT IS SO ORDERED.

DATE: 4/15/94

S/ J. Spencer Letts
United States District Judge

FILED
SEP 29 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Robert Wilson,	)	CV 93-6826 JSL
	)	
Plaintiff	)	
	)	ORDER DENYING
v.	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
Sammy J. Drake,	)	
	)	
Defendant	)	
	)	

The Motions of defendant Sammy J. Drake for Summary Judgment came for hearing regularly on September 26, 1994.

Having reviewed the papers filed in connection with this matter, having heard oral arguement, and being fully apprised of the relevant facts and law.

IT IS HEREBY ORDERED that the Motion of defendant Saammy J. Drake be denied.

IT IS SO ORDERED.

DATE: 9/29/94

S/ J. Spencer Letts
United States District Judge

FILED
SEP16 1996
Cathy A. Catterson, Clerk
U.S.COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert Wilson, Plaintiff-Appellee,	)	No. 94-56428
	)	
V	)	D.C. No.
	)	CV-93-06826-JSL
Sammy Drake; United States of America,	)	
	)	ORDER
Defendants-Appellants	)	

Before: Schroeder, Ferguson, and O' Scannlain, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346 (b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(B) (1) The remedy against the United States provided by sections 1346 (b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is Otherwise authorized.

© The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true

copy thereof to his immediate supervisor or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney or the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(D) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy

of the petition shall be served upon the United States in accordance with the provisions of Rule 4 (d) (4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action for proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346 (b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed or failure first to present a claim pursuant to section 2675 (a) of this title, such a claim shall be deemed to be timely presented under section 2401 (b) of this title if-

(A) the claim would have been timely had it been filed on the date The underlying civil action was commenced, and
(B) the claim is presented to the appropriate Federal agency Within 60 days after dismissal of the civil action.

(E) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

2680. Exceptions

The provisions of this chapter and section 1346 (b) of this title shall not apply to-

(A) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(B) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

© Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(D) Any claim for which a remedy is provided by sections 741-75 to, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(E) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(F) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, 13 (5), 64 Stat. 1043.]

(H) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander,

misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(I) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(J) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(K) Any claim arising in a foreign country

(L) Any claim arising from the activities of the Tennessee Valley Authority.

(M) Any claim arising from the activities of the Panama Canal Company.

(N) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

NO. 94-56428

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

ROBERT WILSON, Plaintiff/Appellee,
V.
SAMMY J. DRAKE; UNITED STATES OF AMERICA, Defendants/Appellants

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPELLEE'S PETITION FOR REHEARING WITH SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC

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**STATEMENT OF COUNSEL
IN RE APPROPRIATENESS OF**

PETITION FOR REHEARING

The undersigned counsel for Plaintiff-Appellee (hereinafter "Plaintiff") certifies that in his judgment grounds for a Petition for Rehearing in this matter exist by reason of the following facts: 1) After this case was submitted on December 14, 1995, the California Supreme Court issued an opinion in the case of Lisa M. v. Henry Mayo Hospital changing the law of respondeat superior in California in such a manner that if properly applied to the facts of this case, would yield a determination that the actions of Defendant-Appellee Sammy Drake (hereinafter "Drake") which are the subject of this lawsuit were not performed within the course and scope of his employment; 2) the opinion of this Court, in light of Lisa M., conflicts with a previous decision of this Court, to wit, Arnold v. USA & Carpenter; and 3) the Court in its decision

has overlooked the possibility that evidentiary proceedings in the District Court might develop further facts supporting its determination that Drake was not acting within the course and scope of his employment when he undertook the aforesaid actions.

SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC

Plaintiff suggests that it would be appropriate for this Petition for Rehearing to be heard en banc by reason of the fact that this case involves a question of exceptional importance, to wit, whether federal employees in California who commit intentional torts of assault, battery and/or false imprisonment as against their subordinates or co-workers may escape civil liability for such torts on the sole basis that such torts were somehow related to the their employment. The rights of many thousands of such employees who may become victims of violence at or near the workplace are at stake.

THE LAW OF RESPONDEAT SUPERIOR IN CALIFORNIA HAS CHANGED SINCE THIS CASE WAS SUBMITTED FOR DECISION

This case was submitted for decision on December 14, 1995. On December 26, 1995, the Supreme Court of California issued its opinion in the case of Lisa M. vs. Henry Mayo Newhall Memorial Hospital, 48 Cal.Rptr. 2d 510. This case reflects what would appear to be the latest pronouncement of the California Supreme Court as to the law of respondeat superior in California and represents a change in such law.

In Lisa M., the plaintiff patient was molested by an ultra sound technician assumed for the purpose of the decision to be an employee of the defendant hospital. The molestation occurred while the ultra sound technician was conducting a prescribed examination of the plaintiff. Plaintiff sued the ultra sound technician and the defendant hospital for various torts, including

battery. An issue for decision was whether the defendant hospital was vicariously responsible for the battery as a tort committed within the scope of the ultra sound technician's employment. In deciding that such battery was not committed within the scope of the ultra sound technician's employment, the California Supreme Court had occasion to review, restate and reformulate the pertinent law on respondeat superior in California. In finding that the hospital was not responsible for the battery committed by the ultra sound technician, the California Supreme Court noted that it is not enough that the employment brought the tortfeasor and victim together in time and place. The tort must be inherent in the working environment and, in a general way, foreseeable from the employee's duties. Such foreseeability only exists as respects those types of injuries that, as a practical matter, are "sure" to occur in the conduct of the employee's enterprise. The employment, in other words, must be such as

"predictably" to create the risk that employees will commit intentional torts of the type for which liability is sought. 48 Cal.Rptr. 2d @ 514 and 516.

The Court in Lisa M. also had occasion to distinguish the case of Mary M. vs. City of Los Angeles, cited by this Court in its opinion herein, noting that in Mary M. it had held a police officer's assault as a generally foreseeable consequence of his position stating further that in view of the considerable power and authority that police officers possess it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct. 48 Cal.Rptr. 2d @ 518.

It is also noteworthy that the California Supreme Court in deciding Lisa M. had considered the three identified policy goals of the respondeat superior doctrine: 1) preventing future injuries, 2) assuring compensation to victims and 3) spreading the losses

caused by an enterprise equitably – for additional guidance as to whether the doctrine should be applied in the circumstances before it. It found no firm direction from consideration of the first two policy goals and as to the third, it determined that the question still to be asked was whether the employee's conduct was so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business. It found that the ultra sound technician's activities to be too "attenuated" to support the allegation of plaintiff's losses to the hospital as a cost of doing business. 48 Cal.Rptr. 2d @ 519.

It is clear from this latest pronouncement of the California Supreme Court in the case of Lisa M., that it would find Drake's employer, whoever it might be, not responsible under the principles of respondeat superior for Drake's assault and battery and false imprisonment of the Plaintiff but would, rather, find to the contrary

because Drake's actions were not foreseeable in the context of the particular enterprise of the employer. Specifically, it was not foreseeable that Drake, as a supervisor of the Plaintiff, an engineer, would resort to the use of force in order to accomplish any of Drake's actual or perceived job responsibilities. It would not be foreseeable that inquiry by Drake as to whether Plaintiff had obtained information concerning a doctor's recommendation that Plaintiff receive reasonable accommodation of his carpal tunnel syndrome would involve Drake falsely imprisoning the Plaintiff. Similarly, it would not be foreseeable that Drake would assault and batter the Plaintiff in an attempt to cause to Plaintiff to either turn off or not activate his tape recorder. That Drake undertook these activities is both unusual and startling 48 Cal. Rptr. 2d @ 519. Accordingly, they fell outside the scope of his employment.

LISA M. RENDERS THE COURT'S OPINION IN THIS CASE IN CONFLICT WITH ITS DECISION IN ARNOLD v. USA & CARPENTER

In a pre-Westfall act case, Arnold vs. U.S.A & Carpenter, 816 F.2d 1306, (1986), the plaintiff, a postal employee, was battered by the defendant post-master Carpenter. This Court noted:

> "We also conclude that battery is beyond the scope of Carpenter's authority. We agree with the D.C. Circuit that the 'out of parameters of a supervisor's line of duty stops short of physical coercion of subordinate employees.' Federal manuals prohibit the use of force by supervisors against their employees regardless of its degree. We see no legitimate interest in shielding Federal officials from claims of physical abuse particularly those involving sexual overtones. Rather a rule denying immunity for claims of battery enforces the prohibition and underscores appropriate behavior. Carpenter has shed his immunity by employing illegitimate means." 816 F2d @ 1312

The D.C. Circuit opinion this Court was referring to in Arnold is McKinney vs. Whitfield. 736 F.2d 766 (D.C. Cir. 1984), written by now United States Supreme Court Justice Ginsburg . Then, sitting as a Judge of the D. C. Court of Appeal, she determined that a supervisor's use of force against a budget analyst in the FAA by way of assault and battery, fell outside the outer parameters of his authority:

> "Supervisors in Whitfield's position have available numerous means, short of physical coercion, for compelling the obedience recalcitrant subordinates. McKinney was warned after the February 25 incident that future refusal to comply with supervisory instructions would result in disciplinary action. The FAA supervisors' handbook apparently provides for suspension or termination as sanctions for employee's subordination. Federal personnel regulations additionally authorize disciplinary actions in the form of reprimands and reductions in rank or pay." 736 F.2d @ 771

Clearly, in light of the aforestated views expressed in Arnold and McKinney, it can hardly, in the words of Lisa M. be sure or predicable that federal supervisors in non-law enforcement type positions will resort to physical force in the performance of their duties. And while it may be assumed (and is presumably forseeable) that if Drake believed that Plaintiff was unwilling to provide the requested information and/or that if Drake believed that Plaintiff's tape recording of the conversation between them was improper, that Drake would attempt to take disciplinary action against Plaintiff, it simply cannot be assumed nor is it foreseeable, let alone sure or predictable, that Drake would use physical force against Plaintiff in discharge of what Drake believed were his duties.

THIS COURT SHOULD MINIMALLY ALLOW THE DISTRICT COURT TO CONDUCT FURTHER PROCEEDINGS TO DETERMINE WHETHER DRAKE WAS ACTING WITHIN THE COURSE AND SCOPE OF EMPLOYMENT AT THE TIME HE UNDERTOOK THE ACTIONSWHICH ARE THE SUBJECT OF THIS LAWSUIT

Drake's motion for summary judgment was denied by the District Court and this Court's opinion reverses that determination and remands the case to the District Court with directions to substitute the United States as the defendant in place of Drake and dismiss the action. Particularly, in light of changes in the law of respondeat superior in California wrought by Lisa M., the District Court should be allowed to make factual and legal determinations after an evidentiary hearing as to whether Drake was acting within the scope of his employment when he subjected Plaintiff to false imprisonment and assault and battery. Meridian Int'l Logistics v. United States, 939 F.2d 740 (9th Cir. 1991) The District Court never had an opportunity to

do this, finding as it did that in California respondeat superior would never be applied so as to immunize the individual tortfeasor. Even if the District Court was in error in so finding, it should nonetheless be given an opportunity to make its own determination on the scope issue under the current state of California law.

Respectfully submitted this 15th day of August, 1996.

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ROLFE, SMITH-LOW & COLEMAN

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